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IN THE
Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES, *ET AL.*

PETITIONERS,

v.

STATE OF OREGON, *ET AL.*,

RESPONDENTS.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF FOCUS ON THE FAMILY AND THE FAMILY RESEARCH COUNCIL AS *AMICI CURIAE*, SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE

This *amicus curiae* brief is filed on behalf of Focus on the Family and the Family Research Council.[1]

Focus on the Family is a non-profit religious corporation committed to strengthening the emotional, psychological, and spiritual health of children and their families in the United States and throughout the world.

Focus on the Family's Founder and Chairman, Dr. James Dobson, a distinguished child psychologist, is the author of numerous books, pamphlets, and papers on child development, education, marriage, and society. Focus on the Family and Dr. Dobson have been at the forefront of the pro-life movement and have spoken and written extensively concerning individual and societal dangers associated with assisted suicide. Focus on the Family has participated as *amicus curiae* on numerous briefs to this Court and others in cases addressing issues of life. It regularly lobbies Congress and state legislatures concerning matters associated with the sanctity and preservation of life. See: www.family.org

Family Research Council is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. FRC is a voice for the pro-family movement in Washington, D.C., and provides policy analysis, legislative assistance, and research for pro-life and pro-family organizations. It also

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[1] In accordance with Supreme Court Rule 37(6), *amici* certify that this brief was authored entirely by Counsel of Record for *amici* and that no part of the brief was authored by any attorney for a party. The Alliance Defense Fund provided a monetary contribution to the preparation or submission of this brief; no other person or entity other than *amici curiae* or their counsel provided a monetary contribution to the preparation or submission of this brief.

seeks to educate legislators on issues that affect American families.

In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC works to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation. FRC publishes and disseminates resource materials, legal memoranda, and public policy studies on pro-family issues. These publications include discussions on the problems and legal controversies surrounding assisted suicide. See: www.frc.org. Its research, publications, and films on the impact of assisted suicide have been distributed to thousands of scholars, students, organizations, and citizens. FRC's legal and public policy experts are continually sought out by members of Congress and state legislators for assistance and advice on matters of bioethics and issues relating to assisted suicide.

FRC has participated in numerous *amicus curiae* briefs in the United States Supreme Court and federal courts, including cases involving pro-life issues.

Focus on the Family and Family Research Council work to preserve and protect the family and have particular knowledge about the social and legal impact of assisted suicide that will be helpful to the Court in this case.

CONSENT TO FILE BRIEF

Petitioner and Respondents, through their counsel of record, consented to the filing of this Brief *Amici Curiae* in support of Petitioner. Their letters of consent are on file with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

The issues in this case implicate important federalism concerns vital to proper constitutional governance under the rule of law.

The appellate court's analysis, granting Oregon's request to enjoin the United States from enforcing the Federal Controlled Substances Act (CSA), is incompatible with the Supremacy Clause in Article VI of the United States Constitution. Mutually exclusive provisions of the Federal CSA and Oregon law make it impossible for a dispensing physician to comply with both. In such situations this Court has deemed the state law preempted – even where a distinctive state interest is at stake. See e.g., *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (finding state community property law preempted by federal military pay law). Thus, even *without considering* the Attorney General's reasonable interpretation of the CSA's implementing regulation, the two statutes here conflict to the extent they cannot consistently stand together.

The Attorney General's interpretive rule confirmed that dispensing controlled substances to assist suicide violates the CSA, and verified that assisting suicide is not a "legitimate medical purpose" within the meaning of 21 C.F.R. 136.04. Pet. App. 100a (AG Order no. 2534-2001). When this interpretation of the CSA's implementing regulation is added into the analysis, federal preemption is irrefutable. In promulgating this interpretive rule concerning the dispensing of controlled substances, the Attorney General acted within the scope of his statutory authority.

Amici, therefore, urge this Court to grant the Petition for Certiorari.

ARGUMENT

THE NINTH CIRCUIT ERRED IN GRANTING OREGON'S REQUEST TO ENJOIN THE UNITED STATES FROM ENFORCING THE FEDERAL CONTROLLED SUBSTANCES ACT (CSA)[2]

The issues in this case implicate important federalism concerns vital to proper constitutional governance under the rule of law.

A. THE FEDERAL CONTROLLED SUBSTANCES ACT PREEMPTS THE OREGON LAW AUTHORIZING PHYSICIANS TO DISPENSE DRUGS TO ASSIST THE KILLING OF A HUMAN BEING

The relevant Oregon law in this case authorizes physicians, in certain circumstances, to prescribe and dispense a lethal amount of drugs for the purpose of assisting in the killing of a human being. Or. Rev. Stat. §§ 127.800 *et seq.* (2003). The Oregon law expressly provides that a physician cannot "be subject to civil or criminal liability or professional disciplinary action" for engaging in the conduct authorized by the Oregon law. *Id.* § 127.885 (1)

The drugs dispensed in the lethal conduct authorized by the Oregon law are controlled substances regulated under the Federal CSA. Pet. App. 114a (Memorandum for the Attorney General, June 27, 2001). Generally, such substances are among those listed in Schedule II of the CSA. *Id.;* see also Pet. App. 65a (opinion of the district court).

The conduct authorized as legitimate and immune from prosecution in the Oregon law is a prosecutable crime carrying serious penalties under the provisions of the Federal CSA.

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[2] Title 21, United States Code, Sections 801 *et seq.*

Under the CSA it is a federal crime for a physician to "dispense" a controlled substance without a legitimate medical purpose in the usual course of medical treatment.[3] See Title 21, United States Code, sections 841(a)(1), 802 (21); 829; 21 CFR § 306.04(a) (1973) (re-designated as 21 CFR § 1306.04(a) (1975); see also *United States v. Moore,* 423 U.S. 122, 124, 139 (1975) (holding that physician can be convicted under the CSA when acting outside professional limits). When "death ... results from the use of such substance" dispensed, the dispensing physician faces significant penalties under the CSA. See, 21 U.S.C. § 841 (b)(1)(C) (prescribing up to life in prison for dispensing Schedule II controlled substances in violation of §841(a) where death results from the use of the drug) see also *Moore*, 423 U.S. at 132 (1975) (recognizing that Congress geared the CSA's penalties "to the nature of the violation, including the character of the drug involved.").

It is worth noting that Congress also expressed disapproval of physician-assisted suicide in its Assisted Suicide Funding Restriction Act of 1997, Pub. L. 105-12,

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[3] Whether the physician acted outside authorized professional limits is not an element of the offense that the government needs to negate; rather, it is an affirmative defense available to the practitioner who carries the burden of going forward with the evidence concerning the exception. 21 U.S.C. § 885(a)(1); *United States v. Steele*, 147 F.3d 1316, 1318-1320 (11th Cir. 1998)(en banc) (and cases cited therein), cert. denied, *Steele v. United States*, 528 U.S. 933 (1999). Congress clearly did not intend an exception for non-medical use of controlled substances for purposes harmful to life. There is no expression within the CSA of any such exception. Permitting states to alter the CSA by injecting such an exception holds the potential to gut it. Under the appellate court's decision, for example, California could pass a law permitting physicians to prescribe and dispense controlled substances to assist patients to get "high" in order to deal with stress.

Apr. 30, 1997, 111 Stat. 23, *codified at* 42 U.S.C. § 14401 et seq., Congress's stated principal purpose of the Act was "to continue current Federal policy by providing explicitly that Federal funds may not be used to pay for items and services (including assistance) the purpose of which is to cause (or assist in causing) the suicide, euthanasia, or mercy killing of any individual." 42 U.S.C. § 14401(b).

Article VI of the United States Constitution states:

> This Constitution, and *the Laws of the United States* which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the . . . laws of any State to the Contrary notwithstanding. U.S. Const. art. VI (emphasis added)

The Federal CSA expressly preempts state laws to the extent "there is a positive conflict between [a provision of the CSA] and that state law so that the two cannot consistently stand together." 21 U.S.C. 903. To be sure, nothing in the CSA prevents a state from enacting its own stricter drug legislation, or prosecuting drug offenses at the state level. *Id.* And, nothing in the Federal CSA preempts a state from regulating within the field of physician assisted suicide, (i.e., nothing in the CSA preempts a state law authorizing physician assisted suicide *per se*). Under conventional conflict preemption principles, however, the Federal CSA clearly preempts Oregon's statute authorizing *the dispensing of controlled substances* to assist suicide. The CSA proscribes the dispensing of controlled substances by physicians without a legitimate medical purpose in the usual course of medical treatment -- and provides severe penalties when "death ... results from the use of such substance...." See, §§841(a)(1), 802 (21), 829; 21 CFR § 1306.04(a)

(1975); *Moore,* 423 U.S. at 124 (1975); and 21 U.S.C. 841 (b)(1)(C). Oregon's law, on the other hand, expressly authorizes - and immunizes against prosecution - the lethal dispensing proscribed and severely penalized in the CSA. Thus, the two statutes here conflict to the extent they cannot consistently stand together.

Moreover, even if the CSA did not expressly preempt the Oregon statute, implied preemption exists where "compliance with both federal and state regulations is a physical impossibility." *Boggs v. Boggs*, 520 U.S.833, 844 (1997) (internal quotation marks omitted), citing *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 98 (1992). The mutually exclusive provisions of the CSA and Oregon law governing the dispensing of controlled substances make it impossible for a dispensing physician to comply with both. In such situations this Court has deemed the state law preempted – even where a distinctive state interest is at stake. See e.g., *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (finding state community property law preempted by federal military pay law).

Thus, the Ninth Circuit's analysis, granting Oregon's request to enjoin the United States from enforcing the Federal CSA, is incompatible with the Supremacy Clause in Article VI of the United States Constitution. The CSA and its implementing regulations plainly proscribe, and therefore preempt, Oregon's law authorizing the dispensing of drugs to assist in the death of a human being -- even *without considering* the Attorney General's statutorily authorized reasonable interpretation of the CSA's implementing regulation at issue here. As discussed in more detail in the next section, this interpretive rule confirmed that dispensing controlled substances to assist suicide violates the CSA, and verified that assisting suicide is not a "legitimate medical purpose" within the meaning of 21 C.F.R. 136.04. Pet. App.

100a (AG Order no. 2534-2001). When this reasonable interpretation of the CSA's implementing regulation is added into the analysis, the certainty of federal preemption is irrefutable. [4]

B. The Attorney General Acted within His Statutory Authority

The court of appeals erred when it held that the interpretive rule promulgated by the Attorney General fell outside his statutory authority. Pet. App. 9a (court of appeals opinion).

As previously discussed, the Attorney General's interpretive rule confirmed that dispensing controlled substances to assist suicide violates the CSA. It also verified that helping one to kill oneself is not a "legitimate medical purpose" within the meaning of 21 C.F.R. 136.04. Pet. App. 100a (AG Order no. 2534-2001, 66 Fed. Reg at 56,608). The interpretive rule further concluded that "[s]uch conduct

[4] The Ninth Circuit's analysis incorrectly presumes this case is about Oregon's right to regulate the practice of medicine -- suggesting that the Attorney General's ruling alters the usual constitutional balance between the states and federal government. Pet. App. at 11a (court of appeals opinion). First, the appellate court over-states Oregon's situation, given that Oregon stands alone among the fifty states in having radically departed from accepted medical practice. Physician-assisted suicide bills in more than 20 states have failed in the past decade, whereas 16 bills prohibiting it have in the past decade and a half been enacted. Yale Kamisar, *The Rise and Fall of the "Right" to Assisted Suicide*, in Foley & Hendin, eds., *The Case Against Assisted Suicide, For the Right to End-of-Life Care 91* (2002) (citations omitted). Second, and more importantly, the court's federalism analysis analyzes oranges when this case is about apples. This case is not about the regulation of medical practice, but about the right of the federal government to regulate controlled substances in a uniform manner.

by a physician registered to dispense controlled substances *may* 'render his registration ... inconsistent with the public interest' and therefore subject to *possible* suspension or revocation." *Id.* quoting 21 U.S.C. § 824(a)(4)(emphasis added). For the reasons discussed below, the Attorney General acted within statutory authority when he promulgated this interpretive rule.

Congress, through the CSA, used the concept of "registration" to identify those physicians who operate "beyond the bounds of professional practice." *Moore*, 423 U.S. at 139 (1975). Physicians and others, who dispense a controlled substance, must "obtain from the Attorney General a registration issued in accordance with the rules and regulations promulgated by him." 21 U.S.C. § 822 (a)(2). Under the CSA, physicians and others registered by the Attorney General to dispense controlled substances are authorized to dispense such substances only "to the extent authorized by their registration and in conformity with the [provisions of the CSA]." 21 U.S.C. § 822 (b). Thus, only "the lawful acts of registrants are exempted" from prosecution. *Moore*, 423 U.S. at 130 (1975).

Congress expressly granted the Attorney General the authority "to promulgate rules and regulations ... relating to the registration and control of the...dispensing of controlled substances and to the registration and control of regulated persons and regulated transactions" 21 U.S.C. § 821.[5]

Under 21 U.S.C. § 823 (f), Congress gave the Attorney General the express authority to deny an

[5] Congress expressly further granted the Attorney General the authority to "promulgate and enforce any rules, regulations, and procedures" deemed "necessary and appropriate for the efficient execution of his functions under this subchapter." 21 U.S.C. § 871(b).

application for registration "if he determines the issuance of such registration is inconsistent with the public interest." Moreover, Congress also expressly gave the Attorney General the authority to suspend or revoke a registration authorized pursuant to section 823 if the Attorney General finds that the registrant committed an act that would "render his registration under section 823 [of the CSA] inconsistent with the public interest as determined under such section." 21 U.S.C. § 824.

In denying, revoking or suspending an application, the Attorney General must consider the following factors in determining the public interest:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience dispensing ... controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

21 U.S.C. § 823

Most of the drugs dispensed in the lethal conduct authorized by the Oregon law likely fall within Schedule II of the CSA, the "most strictly regulated category of substances available for non-research purposes." Pet. App. 114a (Memorandum for the Attorney General, June 27, 2001). *See also* Pet. App. 65a (opinion of the district court).

In 21 U.S.C. 829, Congress mandated the following in connection with the dispensing of Schedule II controlled substances:

> Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II...may be dispensed without the written prescription of a practitioner, [with emergency exceptions not relevant to the discussion at bar]."[6]

Pursuant to the above discussed rulemaking authority vested in the Attorney General by Congress, the Attorney General, in the early 1970's, enacted regulations pursuant to Section 829:

> A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice... An order

[6] The word "dispense" means "to deliver a controlled substance to an ultimate user... by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance...." Title 21, United States Code, Section 802 (10). "'Ultimate user' means a person who has lawfully obtained ... a controlled substance for his own use...." 21 U.S.C. § 802 (27). The term "practitioner" includes a "physician ... licensed, *registered*, or otherwise permitted, by the United States or the jurisdiction in which he practices ... [to] dispense ... a controlled substance in the course of professional practice...." 21 U.S.C. § 802 (21) (emphasis added).

> purporting to be a prescription issued not in the usual course of professional treatment ... is not a prescription within the meaning of this Act and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provide for violations of the provisions of law relating to controlled substances.

21 CFR § 306.04(a) (1973) (redesignated as 21 CFR § 1306.04(a) (1975)[7]

If the Attorney General in the early 1970's promulgated the above rule pursuant to statutory authority, then the Attorney General in 2001certainly had the authority to interpret what it means. Indeed, as noted above, Congress, in 21 U.S.C. § 821, expressly granted the Attorney General authority "to promulgate rules and regulations ... relating to the registrations and control of the...dispensing of controlled substances and to the registration and control of regulated persons and regulated transactions." The Attorney General's interpretive ruling directly promotes the CSA's purposes, by restricting use of controlled substances to legitimate medical purposes. It promotes the medical use of drugs, furthering the public interest in a manner perfectly consistent with the broad intent of Congress. Thus, when the Attorney General published the interpretive rule confirming that dispensing controlled substances to assist suicide violates the CSA, and verified that assisting suicide is not a "legitimate medical purpose" within the meaning of 21 C.F.R. 136.04, he acted

[7] See also, 21 U.S.C. 830 (b)(3)(ii) *Regulation of listed Chemicals – Mail order reporting* – "The term 'valid prescription' means a prescription which is issued for a legitimate medical purpose by an individual practitioner licensed by law to ...prescribe the drugs concerned and acting in the usual course of the practitioner's professional practice."

well within his Congressional authorized authority. Pet. App. 100a (AG Order no. 2534-2001, 66 Fed. Reg. at 56,608).

Moreover, it was reasonable for the Attorney General to subsequently conclude in the interpretive rule that "[s]uch conduct by a physician registered to dispense controlled substances *may* 'render his registration ... inconsistent with the public interest' and therefore subject to *possible* suspension or revocation." Pet. App. 100a (AG Order no. 2534-2001, 66 Fed. Reg at 56,608 quoting 21 U.S.C. § 824(a)(4)) (emphasis added).

The court of appeal's holding that the Attorney General's action exceeded statutory authority because it "evaluates public interest under 21 U.S.C. § 823 without considering all five factors required by that subsection" is misplaced. Pet. App. 17a (court of appeals opinion).

This part of the Attorney General's interpretive rule is merely public notice of a logical consequence that *may* come to one from ignoring the previously established premise that dispensing drugs to assist one to kill oneself is not a legitimate medical practice and violates the CSA. In this regard, although the Attorney General certainly evaluated the public's interest in promulgating the interpretive rule, nothing in the law requires him to consider all five factors delineated in 21 U.S.C. §823(f). Under the CSA, the Attorney General is required to consider these five factors only when denying, revoking or suspending an application for a registration. 21 U.S.C. §§ 823 (f), 824. Nothing in the record indicates that the Attorney General has even contemplated taking such action against the named plaintiffs. Thus, the court of appeals erred since no statutory authority required the Attorney General to consider the five factors when promulgating the interpretive rule.

C. Enjoining the United States from Protecting the Citizenry against Dispensing Drugs to Kill a Human Being, Creates a Culture of Death with Grave Implications

The court of appeals mandated that the United States must not enforce the nation's drug laws against physicians who dispense controlled substances to assist in the killing of a human being. *Amici* believe that human beings are made in the image of God and that therefore every life is sacred. *Genesis* 1:26 (NIV) Underlying the court of appeals decision is a rejection of this inviolable standard present in the natural law, divine law, and positive law, in favor of a morally relative standard where each individual chooses when and whether a human life has positive value.

Ultimately, allowing the dispensing of federally controlled drugs for assisting suicide proceeds from the fundamentally erroneous premise that human life in certain conditions has no positive value. That premise has incalculably grave implications for all of us. Here an appellate court ruled that individuals have the right to take life in one situation, and that the United States cannot enforce the federal drug laws in ways that protect life. When we abandon moral absolutes today, it becomes easy tomorrow to choose death in other ways, for other people, in other situations, since the positive value of life has become an immorally relative individual choice.

The prominent ethicist Sissela Bok concluded, "No society has yet worked out the hardest questions of how to help those patients who desire to die, without endangering others who do not." Sissella Bok, *Physician-Assisted Suicide*, in Euthanasia and Physician-Assisted Suicide 139 (Gerald Dworkin, et al., eds., (1998).

Prior to the enactment of the Federal CSA,[8] euthanasia societies grew during the late 19th and early 20th century eugenics movements in the United States and Europe. Kathleen Foley, and Herbert Hendin, *Introduction*, in The Case Against Assisted Suicide, For the Right to End-of-Life Care 6-7 (Foley & Hendin, eds 2002). Thirty states passed sterilization laws embraced by Presidents Theodore Roosevelt and Woodrow Wilson. *Id.*

The Nazis legalized voluntary euthanasia, then involuntarily euthanized hundreds of thousands of the mentally ill, then extended euthanasia's reach to Jews, gypsies, and other "undesirables." *Id.* at 7.

As late as the 1940s this country's leading euthanasia proponent Dr. Foster Kennedy continued to advocate compulsory euthanasia for retarded children on eugenics grounds. By the 1970s the euthanasia movement's focus shifted to easing the "burden" of caring for the elderly, and then to easing suffering, *id.* at 8 – though notably, no suffering requirement exists in the Oregon law which purports instead to be based on personal choice. The Oregon law requires the physician to advise the patient of palliative care and hospice but does not require that the physician have any training in either and requires no palliative care consultation. The law's data collection requirements are so meager – the form used requires no disclosure of the reason for the patient's request – that study of the Oregon experiment is limited. *Id.* Oregon's law grants "good faith" immunity to the physician and has no enforcement

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[8] The Ninth Circuit erred in relying on the former Attorney General Reno's January 5, 1998 letter suggesting that the CSA did not prohibit prescription-assisted suicide. *See* Pet. App. 7a. The Reno letter assumed, ahistorically, that the CSA was written before there was any consideration of assisted suicide.

mechanism for physician non-compliance, while failing utterly to protect the family.

The Dutch experiment in physician assisted suicide failed frighteningly. The three foreign clinicians who were permitted close study, including case discussion and extensive interviews, independently determined that the Dutch legal requirements were consistently violated and could not be enforced. Foley, et al., *supra*, at 10. Sixty percent of Dutch assisted suicide cases go unreported. *Id.* Most non-reporting involves cases in which physicians have failed to follow established guidelines for voluntariness or consultation.

Worse, in several thousand cases, each year physicians ended their patient's life without the patient's consent. *Id.*at10. Twenty-five percent of physicians terminated one or more patient's life without request. *Id.* In the 1995 study year, 40 percent of the more than 6,000 cases in which physicians actively intervened to cause death involved no explicit request from the patient. Herbert Hendin, *The Dutch Experience*, in Foley, ed., *supra*, at 105; *see also* Zbigniew Zylicz, M.D., *Palliative Care and Euthanasia in the Netherlands: Observations of a Dutch Physician*, in Foley, ed., *supra*, at 123.

Each major Dutch measure to control physician-assisted suicide, including informed consent, consultation, and reporting, largely failed, was modified, or was violated. Hendin, *supra*, at 103, *citing* C. Gomez, *Regulating Death: Euthanasia and the Case of the Netherlands* (1991). This Court in *Washington v. Glucksberg*, 521 U.S. 702, 733 (1997), recognized "that what is couched as a limited right to 'physician-assisted suicide' is likely, in effect, a much broader license, which could prove extremely difficult to

solve and contain." Indeed, what we sow today, we will reap tomorrow.

As the fundamental units of society, families must be protected and promoted by the law and by legal institutions, if order and liberty are to flourish. Yet clinical research shows that suicides in general and physician-assisted suicides more particularly, devastate families. M.D. Reed and J.Y. Greenwald, *Survivor Victim Status, Attachment and Sudden Death Bereavement*, 21 J. of Suicide and Life-Threatening Behavior 385-401 (1991); N.L. Farberow, D.E. Gallagher-Thompson, N.J. Gilewski, and L.W. Thompson, *Changes in Grief and Mental Health of Bereaved Spouses of Older Suicides*, 47 J. Gerontology 357-66 (1992), both cited in Kathleen Foley, and Herbert Hendin, *The Oregon Experiment*, in The Case Against Assisted Suicide, For the Right to End-of-Life Care 158 (Foley, ed. 2002) ("devastating grief and guilt that we see in survivors of suicide"). Imagine the shock of an adult child making the weekly visit to a parent's nursing home, only to discover that a physician proscribed and dispensed a federally controlled substance to help the parent commit suicide the day before. (Oregon's law requires no pre-suicide notification to families.)

The toll on family life is incalculable. Allowing physicians to dispense drugs to assist in killing has an insidious effect on families who support seniors, burdening both the family and the dying. The number of patients in Oregon reporting a concern about being a burden on the family increased from 12 percent in 1998 to 63 percent in 2000, subsequent to the passage of Oregon's physician-assisted suicide law. *Id.* at 162. Physician-assisted suicide creates in practice a frightening "duty to die" – frightening because the practice of physician-assisted suicide has been shown to be so imperfect a means of death that in one Dutch

study fully 20 percent of patients given what was considered to be a lethal dose lived for more than three hours, in some cases requiring the physician to intervene with a lethal injection which would be illegal under the Oregon law. *Id.* at 166, *citing* J.H. Groenewould, A. van der Heide, B.D. Onwuteaka-Philipsen, D.L. Willems, P.J. van der Maas, and G. van der Wal, *Clinical Problems with the Performance of Euthanasia and Physician-Assisted Suicide in the Netherlands*, 342 New England J. Med. 551-56 (2000). Families are occasionally called on to intervene with pillows or plastic bags. Foley & Hendin, *supra* at 164, *(citations omitted).*

The Hippocratic Oath written during the fifth to fourth centuries B.C. declares, "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect." The AMA and more than 40 other national and state medical and health care organizations have urged on this Court that "the ethical prohibition against physician-assisted suicide is a cornerstone of medical ethics"; that the AMA has "reexamined and reaffirmed" the prohibition against physician-assisted suicide; and that "physician-assisted suicide remains 'fundamentally incompatible with the physician's role as healer, would be difficult or impossible to control, and would pose serious societal risks.'" Brief of the American Medical Assn., American Nurses Assn., American Psychiatric Assn., et al., as Amicus Curiae in Support of Petitioners at 5, *Glucksberg* (No. 96-110), available in 1996 WL 656263.

The court of appeals decision rejects this position and the underlying inviolable standard which serves as its foundation. Underlying its decision instead is a morally relative foundation, where each individual chooses when and whether a human life has positive value. The grave implications for our nation that accompany such a choice are

clear. Foundations do matter. Today this Court stands at the statutory construction site and *amici* urge it to grant the government's petition for certiorari.

CONCLUSION

This case implicates important federalism concerns vital to proper constitutional governance under the rule of law. Mutually exclusive provisions of the Federal CSA and Oregon law make it impossible for a dispensing physician to comply with both laws. Thus, the Federal CSA preempts the Oregon law. The appellate court's analysis granting Oregon's request to enjoin the United States, from enforcing the Federal CSA, is therefore incompatible with the Supremacy Clause in Article VI of the United States Constitution.

The Attorney General's interpretive rule confirmed that dispensing controlled substances to assist suicide violates the CSA, and verified that assisting suicide is not a "legitimate medical purpose." The Attorney General, in promulgating this rule, acted well within a plethora of statutory authority expressly allowing him to do so.

Amici ask that this Court restore the right of the federal government to enforce our nation's drug laws under the CSA. Undeniably, we stand at a statutory construction site. If, in the name of an individual's morally relative choice, we enjoin the federal government from proscribing the dispensing of drugs to kill a human being, we merely create an illusion of a nation willing to protect fundamental freedoms. Such a course inevitably erodes the fundamental foundations of our country, as structural institutions of free government stand for a time, while the essence for which they stand cease to exist. Who we are morally as a nation is

a fabric made up of much more than statutes and court decisions. Those who came before us built a constitutional democratic republic upon fundamental foundations of decency. It is now our watch. It is well for us to recall, therefore, the ancient truth that "righteousness exalts a nation." *Proverbs* 14:34 (NIV).

A*mici* urge this Court to grant the Petition for Certiorari.

Respectfully submitted,

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